

DATE: April 3, 1996

CASE NO. 93-ERA-5

In the Matter of

WILLIAM DAVID SIMMONS

COMPLAINANT

v.

ARIZONA PUBLIC SERVICE CO./
ARIZONA NUCLEAR POWER PROJECT

Respondents

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

RECOMMENDED ORDER OF DISMISSAL

This case arises under the provisions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988) and the applicable regulations found at 29 C.F.R. Part 24. The case was initiated as a result of an appeal taken by the complainant from an adverse ruling made by the U.S. Department of Labor. Another Administrative Law Judge entered a Recommended Decision and Order on April 15, 1993 whereby it was recommended that the Secretary dismiss the complaint of William David Simmons. On May 9, 1995, the Secretary entered a Decision and Order remanding this case for further consideration. The matter at that time was assigned to me for hearing.

While the case was pending in this office, Mr. Simmons filed a second complaint bearing Case No. 95-ERA-41 which he sought to consolidate for hearing with the original claim. Subsequently, on January 18, 1996, I issued a Recommended Decision and Order Granting the Respondents' Motion for Summary Judgment in Case No. 95-ERA-41 upon the grounds that the second complaint was time barred and also because the complainant had suffered no adverse employment action. The Secretary has taken no final action on that recommended decision.

This case was called for hearing on March 11, 1996 in Phoenix, Arizona. The scheduled hearing related only to the remaining Docket No. 93-ERA-5. On that date, counsel for both the complainant and the respondents advised on the record that they had reached

an agreement in principle which would result in an administrative disposition. On March 12, 1996, the agreement was codified. On March 22, 1996, there was filed in this office a Joint Motion for a Recommended Decision and a Final Order Approving a Settlement Agreement and Dismissing the Complaints with Prejudice. Attached to the joint motion were a Settlement Agreement and also a General Release.

I note initially, that the entire package of settlement documents relates to both Case Numbers 93-ERA-5 and 95-ERA-41. As was noted above, I have previously issued a Recommended Decision and Order relating to Docket No. 95-ERA-41. I now have no authority to review a recommended settlement of that case since the issuance of the Recommended Decision and Order Granting Summary Judgment caused jurisdiction to pass to the Secretary. Tankersly v. Triple Crown Services, Inc., 92-STA-8 (Sec'y Feb. 18, 1993). Thus, although I am mindful that the settlement proposal has been made with respect to both open dockets, my jurisdiction is limited to a consideration of the Settlement Agreement as it relates only to Docket No. 93-ERA-5.

I also note that both the Settlement Agreement and the General Release form are signed by Donna Simmons who is apparently the spouse of William David Simmons. The complaint in this case was initiated solely by William David Simmons and the jurisdiction of this office relates only to his person. Therefore, the review of these settlement documents is made solely from the standpoint that the Secretary's jurisdiction relates only to the named complainant. This Recommended Decision and Order should be interpreted as having no bearing upon the rights of Donna Simmons concerning any matters addressed in these settlement documents.

The agreement is specific in that it relates to a waiver by the complainant of all claims or actions brought by him against the respondent arising out of alleged acts or omissions occurring prior to the date of the execution of the agreement. I interpret those provisions as being a waiver of the right of the complainant to seek damages in the future based upon claims or causes of action arising out of facts or any set of facts occurring only before the date of the agreement. Polizzi v. Gibbs and Hill, Case No. 87-ERA-38 (Sec'y Order, July 18, 1989).

Review of the Settlement Agreement and General Release reveals that it may encompass the settlement of matters arising under various laws, only one of which is the Energy Reorganization Act. For the reasons set forth in Poulos v. Ambassador Fuel Oil Co., Inc., Case No. 86-CAA-1, Sec'y Order, November 2, 1987, slip op. at 2, I have limited my review of the agreement to determining whether its terms are a fair, adequate and reasonable settlement of complainant's allegations that respondents violated the Energy Reorganization Act.

The agreement allocates a substantial amount of dollars as compensation for damages on account of personal injuries and sickness as defined by § 104(a)(2) of the Internal Revenue Code, as amended. The agreement states that the parties do not intend that the allocated amount be considered compensation for lost wages or income. This Recommended Decision takes into account the total compensation paid to the complainant as a part of the settlement and offers no approval nor disapproval as to the manner in which those funds are apportioned by the parties.

The Settlement Agreement also provides that it is to be governed in all respects by the laws of the state of Arizona, and it then contains a disclaimer as that provision may relate to federal law. Settlement Agreement, Paragraph VII. I interpret that paragraph as meaning that its intent is not to limit the authority of the Secretary under any federal statute or regulation. Milewski v. Kansas Gas and Electric Co., Case No. 85-ERA-21, Sec'y Order Approving Settlement Agreement and Dismissing Complaint, June 28, 1990, slip op. at 2.

The parties also jointly request in the cover letter and in the Settlement Agreement itself that the agreement be maintained in strict confidence and not be disclosed to the public. The affidavit of a corporate officer in support of the request is also included. As a result of the agreement, the respondents with the full support of the complainant invoke their predisclosure notification rights under 29 C.F.R. § 70.26. The agreement at paragraph 3.5 contains the notation that "nothing in this Settlement Agreement shall be construed to restrict the disclosure of the terms of this Settlement Agreement where required by law." The Freedom of Information Act, 5 U.S.C. § 552 (1982) requires federal agencies to disclose requested records unless the records are exempt from disclosure under the Act. I recognize that in at least one instance, this type of agreement has been determined to be confidential commercial and financial information which renders it nondisclosable to the public. However, for purposes of review of the settlement, I assume no position concerning the possible exemption of the agreement from a Freedom of Information Act request.

As limited and construed herein, and following consideration of the Settlement Agreement and the General Release, I find the agreement to be fair, adequate and reasonable, and I believe it is in the public interest to adopt the agreement as a basis for the administrative disposition of these cases.

Therefore, I recommend dismissal of these proceedings with full prejudice based upon authority conferred by 29 C.F.R. § 18.39(b).

ATTORNEY FEES

The agreement also provides for the payment of \$44,512.37 to the attorneys of the complainant as payment in full for all reasonable attorney fees and costs incurred by the complainant in prosecuting his case. An apportionment of those funds is also included.

Title 42 § 5851(b)(2)(B) of the Energy Reorganization Act provides in part as follows:

. . . If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

Complainant's counsel is entitled pursuant to the statute to an award of attorney fees and costs.

In view of the above, it is recommended that the Secretary accept the agreement of counsel and approve an award of \$44,512.37. The award includes all compensation for legal services rendered and litigation expenses incurred by the complainant up to March 12, 1996.

Rudolf L. Jansen
Administrative Law Judge

NOTICE: This Recommended Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).